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10-CV-01852-ORD

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

HILDA L. SOLIS, Secretary of Labor,
United States Department of Labor,

Case No. 2:10-CV-01852-JLR

Plaintiff,

vs.

CONSENT JUDGMENT AND ORDER

KINETICWARE, INC., a Washington
corporation; KINETICWARE, INC.,
401(k) SAVINGS PLAN, an employee
benefit plan; JEFFREY SAMPSON,
an individual; and RICHARD BARNETT,
an individual,

Defendants.

WHEREAS:

A. Plaintiff HILDA L. SOLIS, Secretary of Labor, United States Department of Labor ("Secretary" or "EBSA") pursuant to her authority under §§ 502(a)(2) and (5) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1132(a)(2) and (5), has filed a Complaint against KINETICWARE, INC., a Washington corporation ("Company"); the KINETICWARE, INC., 401(k) SAVINGS PLAN, an employee benefit plan (the "Plan"); JEFFREY SAMPSON, an individual ("Sampson"); and RICHARD BARNETT, an individual ("Barnett").¹

¹ The Plan is named in the Secretary's Complaint as a party necessary for complete relief. Fed. R. Civ. P. 19(a).

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2 B. The Secretary, the Company, Sampson, Barnett, and the Plan (collectively, "the
3 parties") admit that the Court has jurisdiction over this action pursuant to ERISA §
4 502(e)(1), 29 U.S.C. § 1132(e)(1), and that venue lies in the United States District Court,
5 Western District of Washington pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2).

6 C. The parties agree to the entry of this Consent Judgment and Order. The parties
7 further agree that this Consent Judgment and Order shall fully settle all claims of the
8 Secretary asserted in the Complaint.

9 D. The Secretary's Complaint alleges that Defendants Company, Sampson and
10 Barnett are fiduciaries of the Plan within the meaning of Section 3(21), 29 U.S.C. §
11 1002(21), of ERISA.

12 E. The Secretary's Complaint alleges that Defendants Company, Sampson and
13 Barnett breached the fiduciary duties imposed on them by ERISA Sections 403(a),
14 403(c)(1), 404(a)(1)(A) and (B), § 405(a), 406(a)(1)(B) and (D), and 406(b)(1) and (2), 29
15 U.S.C. §§ 1103(a), 1103(c)(1), 1104(a)(1)(A) and (B), 1105(a), 1106(a)(1)(B) and (D), and
16 1106(b)(1) and (2), by failing to remit, and remit timely, employee contributions and
participant loan repayments and employer matching contributions to the Plan.

17 F. The Secretary's Complaint alleges that, as a result of the breaches set forth in
18 Paragraph 2, *supra*, and as more fully alleged in the Secretary's Complaint, by their
19 breaches of their ERISA fiduciary duties Defendants Company, Sampson and Barnett
20 caused losses to the Plan of \$213,992.00, plus lost-opportunity costs calculated through
21 November 1, 2011 in the amount of \$24,256.00, for a total of \$238,248.00.

22 **IT IS HEREBY ORDERED, ADJUDGED, and DECREED** that:

23 1. Judgment is hereby entered against Defendants Company, Sampson and
24 Barnett in the amount of \$238,248.00.

25 2. Pursuant to ERISA § 409, 29 U.S.C. § 1109, Defendants Company, Sampson
26 and Barnett are jointly and severally liable and responsible for restoring \$213,992.00 in

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2 unremitted employee salary reduction contributions and uncollected mandatory employer
3 contributions, plus lost-opportunity costs calculated through November 1, 2011 in the
4 amount of \$24,256.00, less \$37,638 in contributions and lost-opportunity costs owed to
5 Sampson and Barnett as Plan participants as waived in Paragraph 8(a) below, for a total of
6 \$200,610.00 ("Amount Due"), plus pre- and post-judgment Interest as set forth in Paragraph
7 8 below, to the Plan.

8 3. Defendants Company, Sampson and Barnett are permanently enjoined and
9 restrained from violating the provisions of Title I of ERISA, 29 U.S.C. §§ 1001-1191c.

10 4. Defendant Barnett is permanently enjoined and restrained from serving as
11 fiduciary of, or service provider to, any ERISA-covered plan.

12 5. Upon the appointment of the Independent Fiduciary named in Paragraph 6,
13 *infra*, Defendant Sampson is removed as the Trustee of the Plan, and permanently enjoined
14 and restrained from serving as fiduciary of, or service provider to, any ERISA-covered plan.

15 6. Jeanne Barnes Bryant, J.D., CIR, of Receivership Management, Inc., 783 Old
16 Hickory Blvd, Suite 255 Brentwood, TN 37027 shall be, and hereby is, appointed
17 Independent Fiduciary of the Plan, who:

18 a. Will be responsible for collecting, marshalling, paying out, and
19 administering Plan assets, calculating the participants' and beneficiaries' account balances,
20 acting in accordance with and carrying out the duties outlined in Paragraph 8 below, and
21 taking further action with respect to the Plan as appropriate, and, if necessary, terminating
22 the Plan when all of its assets are distributed to all eligible participants and beneficiaries;

23 b. Pursuant to the procedures outlined in the Employee Benefits Security
24 Administration's Field Assistance Bulletin 2004-02, must exercise reasonable care and
25 diligence to identify and locate each Plan participant and beneficiary who is eligible to
26 receive a distribution under the terms of the Plan to the extent the Plan has distributable
assets and shall distribute such assets at a frequency that she determines is appropriate;

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2 c. Has all the rights, duties, discretion and responsibilities of a trustee,
3 fiduciary and Plan Administrator under ERISA, including filing Form 5500s;

4 d. Has the authority to delegate or assign fiduciary duties as appropriate
5 and allowed under the law and may retain assistance as needed, including attorneys,
6 accountants, actuaries, and other service providers;

7 e. Shall have full access to all data, information and calculations in the
8 Plan's possession and under its control, including information and records maintained by the
9 Plan's custodial trustee or service provider;

10 f. Shall have the authority to give instructions respecting the disposition
11 of assets of the Plan;

12 g. Shall obtain and maintain a fidelity bond pursuant to ERISA § 412, 29
13 U.S.C. § 1112;

14 h. Shall comply with all applicable rules and laws;

15 i. Shall be entitled to reasonable compensation, fees and expenses, paid
16 by Defendants Sampson and Barnett consistent with Paragraph 8(k), *infra*. Following the
17 entry of this Consent Judgment and Order by the Court, the Independent Fiduciary shall be
18 required to present to the Court and the Secretary an itemized report of fees and expenses on
19 a quarterly basis ("Fee Report"). The Fee Report shall include the hourly rates of pay, dates
20 and hours of work, a description of work performed, and an itemized statement of expenses.
21 The Secretary requests that the Fee Report shall be deemed approved, unless the Secretary
22 specifically objects to the fees and expenses charged within fifteen business days.

23 7. Defendants shall cooperate fully with the Independent Fiduciary herein
24 appointed by the Court in providing documents or information they may have relevant to the
25 Plan's administration and management.

26 8. Defendants Sampson and Barnett shall restore the Amount Due to the Plan,
plus pre-judgment interest calculated on the Amount Due from November 1, 2011 through

1
2 the date of entry of this Consent Judgment and Order, and post-judgment interest as set forth
3 in Paragraph 8(j), in payment installments as set forth in this Paragraph. Payment
4 installments shall continue until the Amount Due plus the applicable Interest, plus the
5 reasonable fees and costs of the Independent Fiduciary as set forth in paragraph 8(k), are
6 paid in full, provided that all payment installments are made as set forth herein. Payments
7 shall be applied first to accrued reasonable fees and costs of the Independent Fiduciary as set
8 forth in paragraph 8(k), then to Interest, and then to the principal Amount Due.

9 a. Defendants Sampson and Barnett waive their right to restoration of
10 missing employee contributions and employer matching contributions, plus interest thereon,
11 owed to them as Plan participants. The spouse of Defendant Sampson has consented to the
12 waiver of amounts owed, as evidenced by the spousal consent form submitted by Defendant
13 Sampson contemporaneously with the filing of this Consent Judgment and Order ("Waiver
14 of Benefits and Spousal Consent Form"). All restorations of the Amount Due plus Interest to
15 the Plan shall be allocated to all Plan participants other than Defendants Sampson and
16 Barnett.

17 b. On the first day of the month following the entry of this Consent
18 Judgment and Order by the Court, Defendant Barnett shall remit his initial Monthly
19 Payment as defined in paragraph 8(d) to the Plan, through the Independent Fiduciary
20 identified at Paragraph 6 *infra*. Monthly Payments shall be due on the first day of each
21 month.

22 c. On the first day of the month following the entry of this Consent
23 Judgment and Order by the Court, Defendant Sampson shall remit his initial Quarterly
24 Payment as defined in paragraph 8(d) to the Plan, through the Independent Fiduciary
25 identified at Paragraph 6 *infra*. Quarterly Payments shall be due on the first day of every
26 third month following the initial payment (e.g. January 1, April 1, July 1, October 1).

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2 d. Except as provided in Paragraph 8(e), Monthly Payment shall be
3 defined as a variable amount, calculated annually and separately as to Barnett, equal to
4 twenty-five (25) percent of his monthly Disposable Income. Except as provided in
5 Paragraph 8(e), Quarterly Payment shall be defined as a variable amount, calculated
6 annually and separately as to Sampson, equal to twenty-five (25) percent of his monthly
7 Disposable Income multiplied by three. Disposable Income shall be defined as the total
8 amount of income after legally required deductions and withholdings (e.g., federal, state and
9 local taxes; Social Security/FICA; unemployment insurance; state employee retirement
10 systems; and, as to Defendant Barnett, installment payments required by the Internal
11 Revenue Service toward outstanding tax liability for tax year 2001) over the prior twelve-
12 month period, divided by twelve. Notwithstanding any other provision of law, Disposable
13 Income for purposes of this Consent Judgment and Order shall not be reduced by any wage
14 garnishment or other judgment collection initiated against Sampson or Barnett after the date
15 of entry of this Consent Judgment and Order.

16 e. Based on the formula referenced in Paragraph 8(d), *supra*, the initial
17 Monthly Payment for the time period January 1, 2012 through and including December 1,
18 2012, shall be \$837.00 for Barnett; and the initial Quarterly Payment for the same time
19 period shall be \$3,810.00 for Sampson.

20 f. No later than January 1, 2013 and each January 1 thereafter,
21 Defendants Sampson and Barnett shall each calculate his Disposable Income and Monthly
22 Payment pursuant to the formula set forth in Paragraph 8(d). Defendants Sampson and
23 Barnett shall each then forward to the Independent Fiduciary and EBSA his calculation of
24 Disposable Income and Monthly Payment and a completed copy of the attached Financial
25 Affidavit (Exhibit A). The Independent Fiduciary shall confirm the accuracy of Defendants'
26 calculations of Disposable Income and Monthly Payment. If there is a dispute over the
amount of the Monthly Payment, the calculation of the Independent Fiduciary pursuant to

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2 the formula set forth in Paragraph 8(d) shall be the Monthly Payment. Beginning on January
3 1 of each year, Defendants Barnett shall pay to the Plan during the following twelve-month
4 period the recalculated Monthly Payment amount, and Defendant Sampson shall pay to the
5 Plan during the following twelve-month period the recalculated Quarterly Payment amount.

6 g. Defendants Sampson and Barnett each agree that if he receives any
7 funds from any source other than the gross wages, salary, commissions, interest income and
8 dividends itemized annually in the Financial Affidavit specified above in Paragraph 8(e),
9 those funds received less any amounts payable as taxes or attorney's fees (or, if business
10 income, less any reasonable business expenses) up to the Amount Due, less any funds paid
11 by Sampson and/or Barnett as installment payments pursuant to this Consent Judgment and
12 Order, shall be paid to the Plan within 30 days of receipt of such funds, via the Independent
13 Fiduciary appointed under this Consent Judgment and Order, in such manner as directed by
14 the Independent Fiduciary.

15 h. Should Sampson and/or Barnett fail to timely comply with any
16 requirements set forth in this Paragraph, the remaining balance of the Amount Due at the
17 time of non-compliance shall become immediately due and payable and the Secretary will
18 use whatever means possible to recover the Amount Due. Interest will continue to accrue on
19 the Amount Due at the rate set forth in 26 U.S.C. § 6621(a) until such time as the Amount
20 Due is paid in full. Plaintiff acknowledges and agrees that as long as Sampson and Barnett
21 continue to timely comply with all of the requirements set forth in this Paragraph, Plaintiff
22 will not seek wage garnishment or take any other action to enforce or execute upon this
23 Consent Judgment and Order, except as provided in this Paragraph 8(h). Defendants
24 acknowledge that, even if Sampson and Barnett continue to timely comply with all of the
25 requirements set forth in this Paragraph, Plaintiff may, at any time in the future, record and
26 enforce a judgment lien for the remaining payments under this Consent Judgment and Order
against any real property owned wholly or in part by Sampson and/or Barnett. Further,

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2 should Sampson and/or Barnett fail to adequately disclose income or other assets under the
3 terms of this Consent Judgment and Order, the Secretary make seek attachment of such
4 undisclosed accounts and/or assets to satisfy the outstanding obligations under this Consent
5 Judgment and Order.

6 i. Defendants Sampson and Barnett agree that upon request by the
7 Secretary, Sampson and/or Barnett shall provide the Secretary documentation related to the
8 terms of this Consent Judgment and Order within fourteen days of the Secretary's request.
9 Defendants Sampson and Barnett further agree that the Independent Fiduciary may share
10 information relating to this matter with the Secretary.

11 j. Defendant Sampson shall continue making Quarterly Payments, and
12 Defendant Barnett shall continue making Monthly Payments, until the Amount Due plus
13 Interest accruing on the declining balance at the variable rate provided by 26 U.S.C. §
14 6621(a) is paid in full.

15 k. In addition to the Amount Due plus Interest to the Plan under this
16 Paragraph, Sampson and Barnett shall pay the reasonable fees and costs of the Independent
17 Fiduciary. The Quarterly and Monthly Payments made by Defendants shall be inclusive of
18 the fees and costs of the Independent Fiduciary; the Independent Fiduciary shall apply such
19 Payments to her reasonable accrued fees and costs before applying such to Interest and
20 Principal, as set forth in paragraph 8. For purposes of ERISA § 502(l), 29 U.S.C. § 1132(1),
21 and paragraph 9 of this Consent Judgment and Order, the "Applicable Recovery Amount"
22 shall be the total amounts recovered to the Plan, exclusive of amounts paid by Defendants to
23 the Independent Fiduciary for fees and costs as a portion of their Quarterly and Monthly
24 Payments.

25 9. Upon Defendants Sampson's and Barnett's payment of the Amount Due plus
26 Interest paid to the Plan as defined in Paragraph 8(k) ("Applicable Recovery Amount"),
Defendants Sampson and Barnett shall be assessed a penalty under ERISA § 502(1), 29

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2 U.S.C. § 1132(1), in the total amount of twenty percent of the Applicable Recovery Amount.
3 Defendants Sampson and Barnett waive the notice of assessment and service requirement of
4 29 C.F.R. § 2570.83 and, within sixty days following the last payment date, Defendants
5 Sampson and Barnett shall each pay half of such total penalty to the U.S. Department of
6 Labor by each sending a certified or cashier's check payable to the United States
7 Department of Labor (please write "EBSA Case No. 71-009851(48)" on the check) to:

8 U.S. Department of Labor
9 ERISA Civil Penalty Collections
10 P.O. Box 71360
11 Philadelphia, PA 19176-13608

12 10. Wherever submission to the Secretary is required under the terms of this
13 Consent Judgment, such submission shall be made to:

14 Jean Ackerman
15 Regional Director
16 United States Department of Labor
17 Employee Benefits Security Administration
18 90 7th Street, Suite 11-300
19 San Francisco, CA 94103
20 Fax: 415-625-2499

21 11. The Secretary and Sampson have stipulated to the full nondischargeability of
22 the Amount Due in a Joint Stipulation as to Nondischargeability of Debt filed in the related
23 case of Solis v. Sampson (In re Sampson), Adversary Case No. 09-01485-KAO. A copy of
24 the Order as to Nondischargeability of Debt entered March 22, 2010 is attached hereto as
25 Exhibit B and its terms incorporated by reference.

26 12. Defendant Barnett agrees that, in the event that he files for bankruptcy
protection under any chapter of the United States Bankruptcy Code, within thirty (30)
calendar days of filing a petition in any United States Bankruptcy Court, he will execute a
stipulation with the Secretary and consent to the entry of an Order that the identified Loss
Amount plus lost-opportunity costs calculated through the date that Barnett files a

CONSENT JUDGMENT AND ORDER

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300 FIFTH AVENUE, SUITE 1120
SEATTLE, WA 98104
(206) 757-6762

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2 bankruptcy petition is a nondischargeable debt pursuant to § 523(a)(4) of the Bankruptcy
3 Code, 11 U.S.C. § 523(a)(4) ("Stipulation"). The Stipulation and entry of a subsequent
4 Order shall further provide for the continued accrual of lost-opportunity costs at the rate set
5 forth in 26 U.S.C. § 6621 from the date the relevant nondischargeability Order is issued until
6 such time as the Loss Amount is paid to the Plan in full.

7 13. The Secretary and Defendants Sampson and Barnett shall each bear their own
8 costs, expenses, and attorney's fees incurred to date in connection with any stage of this
9 proceeding, including, but not limited to, attorney's fees that may be available under the
10 Equal Access to Justice Act, as amended.

11 14. Defendants Sampson and Barnett expressly waive any and all claims of any
12 nature which they have or may have against the Secretary, the Department of Labor, or any
13 of its officers, agents, attorneys, employees or representatives, arising out of or in
14 connection with the allegations contained in the Complaint on file in this action, any other
15 proceedings or investigation incident thereto or based on the Equal Access to Justice Act, as
16 amended.

17 15. Nothing in this Consent Judgment and Order is binding on any governmental
18 agency other than the United States Department of Labor, Employee Benefits Security
19 Administration.

20 16. This Court retains jurisdiction of this action for purposes of enforcing
21 compliance with the terms of this Consent Judgment and Order.

22 17. By signing their names to this Consent Judgment and Order, the parties
23 represent that they are informed and understand the effect and purpose of this Consent
24 Judgment and Order.

25 The Court directs the entry of this Consent Judgment and Order as a final order.
26 IT IS SO ORDERED, ADJUDGED, and DECREED.

Dated: January 9, 2012


James L. Barnett
UNITED STATES DISTRICT COURT

Entry of this Consent Judgment is hereby consented to:

Approved this ____ day of _____,
2011:

By: _____
RICHARD BARNETT

Approved as to form this ____ day of
December, 2011:

By: _____
RANDY BARNARD
O'Shea Barnard Martin
1500 Skyline Tower
10900 NE Fourth St.
Bellevue, WA 98004
Attorney for Richard Barnett

Approved this ____ day of December,
2011:

By: _____
JEFFREY SAMPSON, *Pro Se*
20627 NE 25th Ct.
Sammamish, WA 98074

Approved this 5th day of January, 2012:

M. PATRICIA SMITH
Solicitor of Labor

LAWRENCE BREWSTER
Regional Solicitor

BRUCE L. BROWN
Associate Regional Solicitor, Seattle

DANIELLE L. JABERG
Counsel for ERISA

By: /s/ Evan H. Nordby
EVAN H. NORDBY
Trial Attorney

Attorneys for Plaintiff
United States Department of Labor

Dated: _____

UNITED STATES DISTRICT COURT

Entry of this Consent Judgment is hereby consented to:

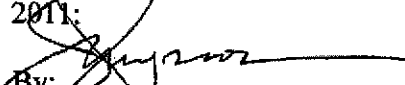
Approved this _____ day of _____,
2011:

By: _____
RICHARD BARNETT

Approved as to form this _____ day of
December, 2011:

By: _____
RANDY BARNARD
O'Shea Barnard Martin
1500 Skyline Tower
10900 NE Fourth St.
Bellevue, WA 98004
Attorney for Richard Barnett

Approved this 29th day of December,
2011:

By: 
JEFFREY SAMPSON, *Pro Se*
20627 NE 25th Ct.
Sammamish, WA 98074

Approved this _____ day of December,
2011:

M. PATRICIA SMITH
Solicitor of Labor

LAWRENCE BREWSTER
Regional Solicitor

BRUCE L. BROWN
Associate Regional Solicitor, Seattle

DANIELLE L. JABERG
Counsel for ERISA

By: /s/ Evan H. Nordby
EVAN H. NORDBY
Trial Attorney

Attorneys for Plaintiff
United States Department of Labor

CONSENT JUDGMENT AND ORDER

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U.S. DEPT. OF LABOR
300 FIFTH AVENUE, SUITE 1120
SEATTLE, WA 98104
(206) 757-6762

1
2 Dated: _____
3 _____
4


5 UNITED STATES DISTRICT COURT
6

7 Entry of this Consent Judgment is hereby consented to:
8

9 Approved this 3rd day of Dec.
10 2011:

11 By: 
12 RICHARD BARNETT

13 Approved as to form this 4th day of
14 December, 2011:

15 By: 
16 RANDY BARNARD
17 O'Shea Barnard Martin
18 1500 Skyline Tower
19 10900 NE Fourth St.
20 Bellevue, WA 98004
21 Attorney for Richard Barnett

22 Approved this _____ day of December,
23 2011:

24 By: _____
25 JEFFREY SAMPSON, *Pro Se*
26 20627 NE 25th Ct.
Sammamish, WA 98074

Approved this _____ day of December,
2011:

M. PATRICIA SMITH
Solicitor of Labor

LAWRENCE BREWSTER
Regional Solicitor

BRUCE L. BROWN
Associate Regional Solicitor, Seattle

DANIELLE L. JABERG
Counsel for ERISA

By: /s/ Evan H. Nordby
EVAN H. NORDBY
Trial Attorney

Attorneys for Plaintiff
United States Department of Labor